



IN THE
SUPREME COURT OF THE UNITED STATES

AUGUST TERM, 1978

NO. **78-519**

ADRON P. BRAINERD,

Petitioner,

vs.

DONALD S. FLANNERY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
~~TO THE SUPREME COURT OF ILLINOIS~~

App. Ct.

Adron P. Brainerd
520 S. Garfield Avenue
Libertyville, Ill. 60048
(312) 362-7545
Petitioner, pro se

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IN THE
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NO.

ADRON P. BRAINERD,

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PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

1. Your petitioner, Adron P. Brainerd respectfully
prays that a writ of certiorari issue to review
the judgement and opinion of the Appellate Court of
Illinois, 56 Ill. App. 3d 991, 373 N.E. 2d 26, peti-
tion for leave to appeal to the Illinois Supreme
Court denied May 26, 1978.

THE OPINION BELOW

The opinion of the trial Court was based upon the lack of the amended complaint to state a cause of action, and ordering the plaintiff not to file a second amended complaint, stating:

"Well, the Court has reviewed this file prior to this date, and must say that the amended complaint goes far afield from setting forth a cause of action. And the factual items set forth, and the Court will not repeat them all, but one which particularly was-- That in the presence of a large crowd the Plaintiff, the Plaintiff was accused by someone of trying robbery of the bank, he was seized, he was arrested, he was taken in handcuffs on foot through the public streets to the police station, matters of that. The entire amended complaint is replete with matters of this fact, and have absolutely no place in a proper pleading.

...With regard to the references that you make to malpractice, ...you attempted to overcome the comments by bringing in the, some standards in your Exhibit F, of the Banking Code, but I couldn't see where there was any evidence of any client relationship between Mr. Flannery and yourself. ...there has to be some relationship before any malpractice can arise, if anybody would raise it, and I don't even know from what I have read whether Mr. Flannery was acting as a director or if he was the attorney for the bank in this particular instance. ... the bank would be liable for the actions of its directors as a whole, and the bank and the directors both, either jointly or severally, would be liable. And the bank was,

that question was disposed of in the two earlier cases wherein you sued the bank, and the...appellate court, in both cases, found that you did not state a cause of action, in my opinion disposes of this particular problem. However, I am going to do this. I am going to give you leave at this time to file Count 4 and Count 5 of the amended complaint. ...I am overruling your motion for judgement of the pleadings, I am granting the motion to strike the amended complaint, and the newly filed Counts 4 and 5 of the amended complaint. And further, I am entering order on you not to file a second amended complaint." C - 148 ROP pages 43-47.

In response to plaintiff's Motion to Vacate the above order, the Court, then added in its opinion:

"16. That in addition to being unable to state a good cause of action, Plaintiff has permitted the Statute of Limitations to run and is therefore barred by the fact that he does not state a cause of action, ..." C - 161

THE APPELLATE COURT DECISION

The Appellate Court of the Second District of Illinois, mistakenly contended that Mr. Brainerd, your petitioner, relied on Ill. REV. STAT. Chap. 83, para. 23, with its proviso of "Fraudulent Concealment," 56 Ill. App. 3d 991, 995, 373 NE 2d 26, 29.

The Court allowed the dismissal on the grounds of Statute of Limitation in that plaintiff failed to plead and prove "fraudulent concealment," an issue first raised by the defendant upon appeal.

JURISDICTION

The Supreme Court of Illinois denied leave to Appeal on May 26, 1978. This court has jurisdiction under 28 USC 1257. The question raised for review was first raised and decided in the Appellate Court Second District of Illinois, and the issue specifically presented in petitioner's petition for leave to appeal to the Illinois Supreme Court.

In addition the Supreme Court has Jurisdiction because Counts IV and V of the action below were predicated on and necessarily involved the National Banking Laws.

The Court also has jurisdiction, because Counts IV and V of the Amended Complaint were predicated on, and necessarily involved the National Banking Laws.

QUESTION PRESENTED

Can the Illinois courts apply the Discovery Rule when pleadings are presented by Lawyers, and apply the Fraudulent Concealment Rule, when pleadings are presented by a plaintiff who proceeds prose, without being repugnant to the United States Constitution?

STATEMENT OF THE CASE

The case involves the Indemnification of the First National Bank of Libertyville, about three weeks after stop payment was made on a cashier's check, which was done at the insistence, of the bank, for the consideration of the return to the plaintiff, the funds held for the cashier's check. These terms were that of the bank which expressly provided the return of said funds. The defendant Mr. Flannery, Bank Lawyer and Director, thereafter told the bank to take Brainerd's money and give it to someone else. When Mr. Brainerd went to the bank to withdraw his funds, the same officer of the bank who insisted upon him signing the indemnity bond arrested him for attempted bank robbery. Mr. Flannery was instrumental in then calling the F.B.I. and the Attorney General to have Mr. Brainerd charged with attempted Federal Bank robbery.

When this failed Mr. Flannery then had the charge of disorderly conduct made against Mr. Brainerd.

He later appeared in court through co-counsel and asked the court to nolle pros, which was done.

Mr. Brainerd, filed an Action against certain officers of the bank for not returning his funds and for false arrest.

The trial judge allowed the complaint to be stricken with leave to amend in 30 days, when Mr. Brainerd appearing pro se, needed more time it was denied, and about a week later the bank officers had an order extended which "dismissed with prejudice." The stricken complaint, without proper notice or hearing. Later an Attorney filed a complaint correcting the technical defects previously complained of, and the court allowed dismissal as res judicata.

In 1975 Mr. Brainerd learned of Mr. Flannery's involvement through the Freedom of Information Act, and this action was then filed. During the first hearing, the issue was raised that Mr. Brainerd should have known of Mr. Flannery's involvement, after all they were both at the police station when Mr. Flannery was pressing charges. Mr. Brainerd related this in the amended complaint, and explained that this was the first he knew of this because he was handcuffed to a chair in another room.

THE APPELLATE COURT DECISION

The appellate court mistakenly contended that Mr. Brainerd relied on the ILL. REV. STAT. Chap. 83, Para. 23, with its provision of "Fraudulent Concealment," in their opinion 56 Ill. App. 3d 991, 995 373 NE 2d 26, 29 Stating:

"Apparently the plaintiff contends that his cause of action is preserved under the provisions of section 22 of the limitations act (Ill. Rev. Stat. 1975 ch. 83, par. 23)"

The above contention is FALSE!

When it was apparent that the Appellate Court misconstrued the facts, Mr. Brainerd filed a motion to require the defendant Mr. Flannery to answer, admission of Facts and Genuineness of Documents, which would prove that Mr. Brainerd did not plead Chap. 83, Sec. 22, and that his MOTION TO PRODUCE, attached as an exhibit, which was filed in 1970 showed diligence upon the part of the plaintiff. The motion was denied.

ARGUMENT

This decision of the Illinois Appellate Court of the Second District, affirmed by the Illinois Supreme Court clearly shows discrimination against Mr. Brainerd because he is proceeding pro se.

I. THE SECOND COMPLAINT WAS NOT
BARRED BY RES JUDICATA

The Illinois Court in Jupp v. Gray App. 5 Ill. Dec. 8, 361 N.E. 2d 8, found that an involuntary dismissal of plaintiff's cause constituted a "nonsuit" within meaning of Limitations Act section Chap. 83 Sec. 24a Ill. Rev. Stat. which provides one year for recommencement of action following involuntary nonsuit. To the same effect, Statzke v. Edwards Ill. App. (1978) 374 N.E. 2d 1071, and, Aronda V. Hobart Mfg. Corp. 66 Ill. 2d 616, 363 N.E. 2d 799.

II. THE DISCOVERY RULE APPLIES

The Appellate Court in the case at bar relied on Wilson v. Lebeuour (1974) Ill. App. 3d 608, 317 N.E. 2d 772, 773, however Wilson did rely on Section 23 with its fatilistic "Fraudulent Concealment" which Mr. Brainerd didn't rely, secondly she appeared pro se the common factor of the two cases.

Illinois Courts adopted the "discovery rule" in 1970 by Lipsey v. Michael Resse Hosp., 46 Ill. 2d 32, 262 N.E. 2d 450, and applied it to the legal profession in 1973 in Kohler v. Wooden 15 Ill. App. 3d 455,

"A cause of action for legal malpractice does not accrue until the client discovers, or should discover the facts establishing the element of his cause of Action...It is manifestly unrealistic...to bar...a cause of action before he has had an opportunity to discover that it exists." Page 460.

Thus since Kohler the only time the "discovery rule" has not applied is Wilson and the case at bar, the two pro se cases.

VII.

THE ABOVE DISCRIMINATION
IS REPUGNANT TO THE FEDERAL
CONSTITUTION

The purpose of the equal protection clause of the Fourteenth Amendment to the Federal Constitution is to secure every person within the state's jurisdiction against intentional and arbituary discrimination, whether occasioned by the express terms of a statute or by its improper execution through duly constituted agents Sunday Lake Iron Co. v. Wakefield tues. 247 U.S. 350.

A law, though fair on its face and impartial in appearance, which is of such a nature that it may be applied and administered with an evil eye and unequal hand so as to make unjust and illegal discrimination is, when so applied and administered, within the prohibition of the Federal Constitution. Norris v. Alabama 294 U.S. 587.

The due process clause of the Federal Constitution, has as its purpose the insuring of the fair and orderly administration of the laws, International Shoe Co. v. Washington, 326 U.S. 310, its guaranty is to inhibit the taking of one person's property and giving it to another, contrary to settled usages and modes of procedure, without notice and opportunity for a hearing, Ochoa v. Kernondex v. Morales 230 U.S. 139.

Due Process of law must be understood to mean law in the regular course of administration through courts of justice, in the settled course of judicial proceedings, Due Process has to do with denial of fundamental fairness, shocking to the universal sense of justice; it deals neither with power nor with jurisdiction, but with their exercise, 16 AM JUR 2d Sec. 546 Pages 938, 939, Constitutional Law.

Mr. Brainerd is now barred forever from recovery of his funds, rightfully his, through no fault of his own, he is denied redress against the responsible person before he knew he was the one that caused the loss, he cannot now seek redress against the Court officials (judges) who have hermitrically sealed its doors, they have "Judicial indemnity" granted by this court. Fundamental fairness demands this court review the decision of the Illinois Courts.

Respectfully Submitted,

Adron P. Brainerd

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(312) 362-7545

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

May 26, 1978

Mr. Adron P. Brainerd
520 S. Garfield Avenue
Libertyville, IL 60048

No. 50589 - Adron P. Brainerd, petitioner vs. Donald S.
Flannery, respondent. Leave to appeal, Appel-
late Court, Second District.

You are hereby notified that the Supreme Court
today denied the petition for leave to appeal in the above
entitled cause. Mr. Justice Moran took no part.

Very truly yours,

Clerk of the Supreme Court

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No. 76-490

JAN. 13, 1978

APPEAL from the Circuit Court of Lake County; the Hon.
FRED H. GEIGER, Judge, presiding.

Adron P. Brainerd, of Libertyville, for appellant, pro se.

Robert M. Bollman and Louis Brydges, both of Diver,
Brydges, Bollman, Grach & Riseborough, and Kathleen Sweet and
James J. Hermann, both of Hall, Meyer, Fisher, Holmberg &
Snook, both of Waukegan, for appellee.

MR. JUSTICE GUILD delivered the opinion of the court:

This is the third suit involving the same set of facts
which allegedly arose in the year 1967. In Brainerd v. First
Lake County National Bank (1969), 109 Ill. App. 2d 251, 248
N.E.2d 542, the plaintiff sued the bank pertaining to payment
by the bank of a \$3100 cashier's check. The plaintiff,
Brainerd, obtained a cashier's check from the defendant bank
in that sum, went to the State of Texas and delivered the
check to an airplane company after endorsing it to its order.
Upon his return to Illinois he called the bank and asked that
payment be stopped on the same. This was done but it was
then determined by the bank that, legally, it was obligated
to honor the cashier's check endorsed by Brainerd to the
airplane company, which they proceeded to do. As a result
of this action Brainerd brought the first action in the circuit
court of Lake County, the same was appealed to this court in
1969 and the order of the trial court dismissing the complaint
was affirmed.

In 1970 Brainerd brought another suit against the First
Lake County National Bank of Libertyville involving the same
factual circumstances. This complaint was filed in April
1970. Upon motion of the defendant bank the trial court en-
tered an order finding that the matter had been adjudicated
in an earlier proceeding between the same parties and dis-
missed the complaint with prejudice. In July 1970 the plain-
tiff then filed a petition under section 72 of the Civil
Practice Act (Ill. Rev. Stat. 1969, ch. 110, par. 72), seek-
ing to vacate the judgment entered in the earlier 1969 pro-
ceedings. The trial court denied his petition to rehear,
reconsider or vacate the 1969 proceedings, the plaintiff
appealed and the two appeals were consolidated in this court
as is found in Brainerd v. First Lake County National Bank
(1971), 1 Ill. App. 3d 780, 275 N.E. 2d 468. In that case
this court found that plaintiff's amended petition, purportedly
brought under section 72, completely failed to set forth facts
constituting grounds for relief under that section and that it
was properly denied by the trial court. As to the other portion
of that suit, this court held that there was an adjudication

upon the merits in the earlier case (109 Ill. App. 2d 251), and that the same was a bar to a future suit by the plaintiff against the same defendants arising out of the same transaction.

The only difference between the two prior suits, which we have held were properly dismissed, and this one is that the plaintiff has now brought this proceeding against one member of the board of directors of the bank who is an attorney, to wit: the defendant Donald S. Flannery. The pleadings and documents filed, pro se, by the plaintiff are difficult to follow, inappropriate in some instances, and it is to be noted that a portion of the pleadings were stricken from the record by the trial court as being scurrilous. In any event, the instant cause finally came on for determination upon the plaintiff's five count amended complaint. The plaintiff's motion for judgment on the pleadings was denied. The defendant's motion to strike and dismiss the amended complaint in toto was granted. A subsequent motion to vacate the order dismissing the complaint made by the plaintiff was denied. The plaintiff appeals from the order dismissing the complaint, entered April 1, 1976, and the order denying his motion to vacate the order of dismissal, entered July 22, 1976. He also appeals from an order denying "plaintiff's motion for findings of fact and conclusions of law relative to above order," referring to the order of dismissal of April 1, 1976. We will not consider this last issue as the same is merely an attempt by the plaintiff to have the court explain the reasons for his order of dismissal and we find the same to be completely without merit. As we have indicated, this is the third appeal involving the same issues and the only additional matter contained in the instant cause is the contention that Flannery, as an attorney, advised the bank that the cashier's check in question should be paid to the party to whom it was endorsed by the plaintiff Brainerd. While it is difficult to ascertain the reasoning of the plaintiff herein in the instant case, the plaintiff has raised a number of other issues, consideration of each one not being necessary for our decision herein.

The basic premise of the plaintiff in the instant action is that the attorney in question, the defendant, advised the bank as to its course of action and that this was fraudulently concealed from the plaintiff herein. On this basis the plaintiff contends that the 10-year statute of limitations (Ill. Rev. Stat. 1975, ch. 83, par. 23), applies. The instant lawsuit was filed 8 years after the occurrence in question and the apparent basis for the cause of action of the plaintiff is tortious inducement of breach of contract. As the defendant properly points out, this is an action in tort and this is so recognized by the pro se pleadings of the plaintiff himself.

The defendant herein contends that the instant lawsuit is barred under the statutes of limitations of Illinois. This issue was raised in the trial court by the defendant. The trial judge, in dismissing the action, did not state the basis for the dismissal in his order of April 1, 1976. Upon the filing of the aforementioned "request for findings of fact and conclusions of law and production of report of proceedings" by the plaintiff, the trial court, on April 22, conducted a hearing from which it may be inferred that he found that the issues in the instant case were res judicata because of the two prior cases mentioned herein. At that time the court further ordered that the plaintiff could not file a second amended complaint and found no reason to delay the appeal. On May 13, 1976, the plaintiff moved to vacate the order of April 1, 1976, and on July 22, 1976, the trial court found that in addition to the plaintiff being unable to state a good cause of action that the plaintiff was barred by the statute of limitations. It is not necessary for us in this opinion to determine whether or not the cause was res judicata as the issue of the statute of limitations properly pleaded by the defendant herein is determinative of the disposition of this case.

1-3 At the outset it is to be noted, as indicated above, that the action herein is apparently a tortious action based upon the inducement of a breach of contract. There is obviously no contract between the defendant herein and the plaintiff, and were we to consider the bank account of the plaintiff with the bank to be a contract we then reach the issue as to whether or not plaintiff's action for the alleged tortious conduct on the part of the attorney/director for the bank is barred by the statute of limitations. Apparently the plaintiff contends that his cause of action is preserved under the provisions of section 22 of the Limitations Act (Ill. Rev. Stat. 1975, ch. 83, par. 23). That provision provides:

"If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards."

The requirements which must be met in order to preserve a cause of action under this section were recently stated in *Wilson v. LeFevour* (1974), 22 Ill. App. 3d 608, 609-10, 317 N.E.2d 772, 773:

"A party seeking to avail himself of section 22 of Limitations Act must allege facts that affirmatively show fraudulent concealment of the cause of action by the defendant which prevented the plaintiff from discovering that she had a cause of action. (Citation.) To substantiate such an allegation, a plaintiff must prove that the defendant made representations which were known by him to be false, that they were made to deceive the plaintiff, and that the plaintiff believed the representations and relied upon them to his damage or injury. (Citation.)"

Further, as was stated in *Bush v. Continental Casualty Co.* (1969), 116 Ill. App. 2d 94, 100, 253 N.E.2d 619, 622:

"...This rule that the Statute of Limitations begins to run only from the discovery of the cause of action, does not apply when the party affected by the fraud might with ordinary diligence have discovered it."

The *Bush* case goes on to point out that mere silence by a person allegedly liable does not amount to fraudulent concealment and that the concealment must consist of affirmative acts or representations.

An examination of plaintiff's amended complaint herein reveals that he has utterly failed to meet the requirements imposed by section 22 of the Limitations Act. There are no allegations concerning any representations made to plaintiff; neither is there any allegation of reliance upon such allegations. We find nothing else alleged which would amount to an affirmative act of concealment by the defendant herein of plaintiff's cause of action. Likewise, there is nothing in plaintiff's amended complaint to indicate why, if he had acted with ordinary diligence, he failed to discover the connection of the defendant herein to the factual situation which forms the basis of his complaint. This is especially so in view of the fact that the plaintiff has twice sued the bank over these same matters.

4 The instant cause of action is barred by the provisions of section 15 of the Limitations Act (Ill. Rev. Stat. 1975, ch. 83, par. 16), which provides that all civil actions

not otherwise provided for shall be commenced within 5 years next after the cause of action accrued. We do not find that the plaintiff herein has stated a cause of action under the provisions of section 22 of the Limitations Act which would allow him 5 years from the discovery of the alleged cause of action. He has neither stated any facts that would so indicate and, from our examination of the record, we find none.

We therefore find that the order of the trial court finding that the instant suit is barred by a statute of limitations hereinabove set forth is correct. As we have indicated, in view of this ruling it is not necessary to pass upon the other allegations of the plaintiff in this appeal.

5 We are also faced here with the issue, raised on cross-appeal, of whether the trial court erred in denying the defendant's motion for expenses and attorney's fees made pursuant to section 41 of the Civil Practice Act (Ill. Rev. Stat. 1975, ch. 110, par. 41). While the plaintiff's allegations are insufficient and beyond the applicable statute of limitations, it must be established by the defendant here that those allegations were not made with reasonable cause and were untrue. The application of section 41 is within the discretion of the trial court. (See *Dudanas v. Plate* (1976), 44 Ill. App. 3d 901, 358 N.E.2d 1171; *Village of Evergreen Park v. Spangler* (1976), 40 Ill. App. 3d 947, 353 N.E.2d 257.) We have thoroughly examined the record and cannot find that the trial court abused its discretion regarding section 41, especially since the defendant failed to establish the untruth of the plaintiff's allegations. The ruling of the trial court denying the defendant's motion for expenses and fees is correct.

For the foregoing reasons the orders of the trial court dismissing the plaintiff's amended complaint and denying the defendant's motion for expenses and fees are hereby affirmed.

Affirmed.

RECHENMACHER and WOODWARD, JJ., concur.